Supreme Court, U. S.
FILED
SEP 27 1972
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

No. 72-501

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

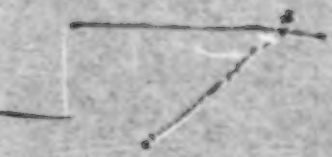
MILTON A. SMITH
*General Counsel*

OTTO F. WENZLER
*Labor Relations Counsel,*
Chamber of Commerce of
the United States of America
1615 H Street, N.W.
Washington, D.C. 20006

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602
*Attorneys for the Chamber of Commerce of the United States of America*

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001



IN THE

# Supreme Court of the United States

---

No.

---

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

---

## BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

---

### I.

### INTEREST OF THE AMICUS CURIAE

This brief is filed on behalf of the Chamber of Commerce of the United States of America, a federation with a membership of over 3,800 state and local chambers of commerce and trade associations. The Chamber has an underlying membership of more than five million business firms, the vast majority of which are subject to the National Labor Relations Act.[1]

---

[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

The issue presented here—whether, once the General Counsel of the National Labor Relations Board has determined to issue an unfair labor practice complaint, he may thereafter adjudicate the rights of charging parties without providing them with the opportunity to be heard and to obtain review of his actions—is a matter of substantial interest to the Chamber. The Chamber has sought on several recent occasions to obtain a delineation by this Court of the rights of charging parties before the Board[2] and, in particular, their rights in the context of settlement negotiations.[3] This area is one which lacks any authoritative guidance. It is one which employers, as well as unions and individual charging parties, encounter daily and which, perhaps more than any other, is dispositive of their disputes before the agency. Moreover, this Court and the lower courts, as Circuit Judge Rosenn noted in his dissenting opinion in the court below, have been increasingly careful to insure that "those whose interests are sought to be protected by a statute should be able to seek judicial review." The instant case represents a sharp departure from that trend. By rea-

[2] The Chamber was thus instrumental in obtaining review by this Court in two cases raising the issue of the rights of charging parties in proceedings under Section 10(l) of the Act, only to have the question become moot before it was decided. *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); *The Los Angeles Herald Examiner* v. *Kennedy*, 400 U.S. 3 (1970). The Chamber also supported unsuccessful efforts to present similar matters to this Court last term. *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, No. 1588, and *Terminal Freight Cooperative Association* v. *Solien*, No. 71-925.

[3] In two cases last term, in which the Chamber filed *amicus* briefs, review was unsuccessfully sought to resolve a controversy as to (a) whether a Board regional director may decline to petition for injunctive relief under Section 10(l) of the Act in favor of securing lesser or other relief through a settlement agreement (*Terminal Freight Handling Co.* v. *Solien*, No. 71-609) and (b) whether a Board regional director may exclude charging parties from meaningful participation in the settlement of their charges (*Sears, Roebuck and Co.* v. *Solien*, No. 71-924).

son of the decision below, the parties whose very aggrievement is at the crux of the controversy are deprived of any judicial recourse.

For each of these reasons, the Chamber has a significant concern in this case and respectfully requests the Court to consider its views.

## II.

## REASONS FOR GRANTING THE WRIT

1. Pre-complaint settlement negotiations—and the rights of charging parties in such negotiations—are matters that go to the heart of the Act. In recent years about 90 per cent of all Board cases have been disposed of without formal adjudication. Approximately 80 per cent of all matters which the General Counsel believes to be meritorious are settled prior to a decision by the Board. *Thirty-Fifth Annual Report of the National Labor Relations Board* for 1970, pp. 1, 4; *Thirty-Fourth Annual Report of the National Labor Relations Board* for 1969, p. 1. Many of these cases are settled in the precise situation involved in this case, *i.e.*, where a determination as to issuance of a complaint has been made even though no actual complaint has issued.

2. The decision of the court below places charging parties at a substantial disadvantage in such a case. The charging party is deprived of the right to be heard on objections to the proposed disposition of his charges as well as the right to appeal from an adverse disposition thereof. These are rights accorded charging parties at other stages of the adjudicatory process. Indeed, it is only by means of such rights that the charging party may project his views as to the remedial adequacy of the proposed relief and in some degree affect his own destiny within the proceedings he himself initiated and in which he has a paramount concern. There is no basis,

once the General Counsel has made a decision, as in the instant case, that there is reasonable cause to believe a charge is true and that complaint should issue, to deprive a charging party of such a necessary protection of his vital interests.[4] The propriety of such a deprivation, potentially affecting all charging parties before the Board, is one which deserves the attention of this Court.[5]

3. Apart from affecting the right of a charging party to participate in and obtain review of the disposition of his charges, the decision below also had additional significant ramifications. The charging party has a full panoply of rights once a case enters the adjudicatory, in contrast to the investigative, stage. It is at this point that the General Counsel's unreviewable discretion terminates.[6] Once a case reaches the point of adjudication,

---

[4] The decision below is diametrically contrary to the Eighth Circuit's approach in *Sears, Roebuck and Co.* v. *Solien*, 450 F.2d 353 (8th Cir. 1971), *cert. den.* No. 71-924, O.T. 1971. There, in a case involving an attack upon the manner in which the General Counsel negotiates a settlement, the court held the suit premature. It noted that there was still the possibility of "administrative relief from the Board" and thereafter by an appellate court which could review "*all* questions of the regularity of Board proceedings, Constitutional rights, or statutory authority . . ." (Emphasis added). In the instant case, by concluding that this matter falls within the General Counsel's "unreviewable discretion", the lower court has precluded precisely such further recourse to the Board and courts.

[5] The instant case presents one of the rare opportunities for this Court to review the important questions presented. As settlements are of the most use to parties with limited means and as the legal avenues for obtaining review of settlement procedures are ill-defined, it is unlikely that parties will be inclined to bring the problems to the Court's attention. This ground alone is sufficient to warrant consideration of such important issues. See, *e.g.*, *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47 (1938). *Cf. Silver King Co.* v. *Conkling Mining Co.*, 256 U.S. 18 (1921).

[6] The present case also affords the Court with an opportunity to refine the area of the General Counsel's discretion and clarify the equity actions permitted under *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938), to contest actions of the General Counsel which are not subject to Board review by virtue of § 3(b) of the

all parties have the right to be timely informed as to the controverted issues and the time, place and nature of the proposed hearing for their resolution. 5 U.S.C. § 1004(a). They also have the right to have the agency proceed to such a hearing "with reasonable dispatch". 5 U.S.C. § 1005(a); *Deering-Milliken* v. *Johnson*, 295 F.2d 856 (4th Cir. 1961). There are, in addition, other adjudicatory rights expressly conferred by the Administrative Procedure Act[4] (5 U.S.C. § 1004), the Rules and Regulations of the National Labor Relations Board[5] and the decisions of various courts.[6] And there is the right, once the General Counsel has made his final determination as to whether complaint will or will not issue, that

---

Act. For example, in *Sears, Roebuck and Co.* v. *Solien*, 450 F.2d 353 (8th Cir. 1971), *cert. den.* No. 71-924, O.T. 1971, the Court implied that *in no case*, apart from the limited situation contemplated by *Leedom* v. *Kyne*, 358 U.S. 184 (1954), would a district court be entitled to review the action of the General Counsel. Other courts, however, have questioned such a restricted view of the General Counsel's discretion. *Southern California District Council of Laborers* v. *Ordman*, 318 F.Supp. 633 (C.D.Cal. 1970); *Local 12, Allied Industrial Workers* v. *Pothman*, 209 F.Supp. 295 (D.D.C. 1962); *Frito Company* v. *NLRB*, 330 F.2d 485 (9th Cir. 1964); *Amalgamated Association of Street, Electrical, Railway and Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274, 2 L.E.D. 473, 493, n.2 (1971) (Dissenting Opinion of Mr. Justice Douglas). *Cf., Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970).

[5] *Cf., e.g.*, Section 101.7 of the Board's Rules and Regulations, establishing the procedure utilized in disposing of charges prior to the institution of "formal action by issuance of a complaint", and Section 101.9, setting forth the far-different procedure to be followed once such "formal proceedings have begun". The critical difference, it is submitted, should not be that which the Board draws such "informal" and "formal" stages of the adjudicatory process. Rather, the line must be drawn, as mandated by Section 8(d) of the Act, between the investigative and adjudicative stages in a Board proceeding.

[6] See, *e.g.*, *Automobile Workers* v. *NLRB*, 427 F.2d 330 (6th Cir. 1970), holding that the Board may not decline whether conduct complained of is an unfair labor practice and, if it so finds, issue a remedial order. See also *Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965).

such a decision be made available to the public. 5 U.S.C. § 552; *Sears, Roebuck and Co.* v. *Goslee*, —— F.Supp. ——, 80 LRRM 3428 (D.D.C., August 10, 1972).[9]

4. The question of when a case crosses the line from the investigative to the adjudicatory stage is thus of fundamental importance in the administration of the Act. In effect, the issue is when the work of one agency, the General Counsel, has concluded and the work of another agency, the Board, has begun.[10] The decision below, by obscuring the point of demarcation, has created substantial doubts as to the rights which flow from the statutory scheme. These doubts should be laid to rest. A consideration of the issue here presented, accordingly, will not cause the Court's time to be misspent.

---

[9] This right to be informed of the General Counsel's determination which often becomes critical in subsequent grievance-arbitration proceedings (as, for example, when the applicable contract makes Board law determinative) and in otherwise regulating conflicting interests of the parties, may disappear all together under the decision below. Thus, should a meritorious charge be settled, as in the present case, there is no record of the General Counsel's discretion that he should proceed to complaint. Conversely, should a decision be made that a charge is not meritorious, a withdrawal is thereafter solicited and if obtained similarly leaves the parties with no record as to the General Counsel's determination. Rules and Regulations of the Board, § 101.5. The position urged in this case by petitioners and the Chamber, and applied by the Court in *Sears*, would preclude this incongruous result.

[10] In *Sears, Roebuck and Co.* v. *Goslee*, —— F.Supp. ——, 80 LRRM 3428, 3429, n.9 (D.D.C. August 10, 1972), the Court noted that "General Counsel concedes that in the performance of his pre-complaint prosecutorial authority, he is clearly an agency within the meaning of 5 U.S.C. § 551(1)."

## III.

## CONCLUSION

For the foregoing reasons, the Chamber urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

MILTON A. SMITH
*General Counsel*

OTTO F. WENZLER
*Labor Relations Counsel,*
Chamber of Commerce of
the United States of America
1615 H Street, N.W.
Washington, D.C. 20006

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602

*Attorneys for the Chamber of Commerce of the United States of America*